Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-143

SUPREME COURT OF THE UNITED STATES

October Term, 1983

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF ARIZONA AND INDIANA

LINLEY E. PEARSON
Attorney General
State of Indiana
219 State House
Indianapolis,
Indiana 46204

ROBERT K. CORBIN
Attorney General
State of Arizona

ANTHONY B. CHING
Solicitor General
(Counsel of Record)
1275 West Washington
Phoenix, AZ 85007
(602) 255-3333

17pp

No. 84-143

SUPREME COURT OF THE UNITED STATES

October Term, 1983

KENNETH EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF ARIZONA AND INDIANA

LINLEY E. PEARSON
Attorney General
State of Indiana
219 State House
Indianapolis,
Indiana 46204

ROBERT K. CORBIN
Attorney General
State of Arizona

ANTHONY B. CHING
Solicitor General
(Counsel of Record)
1275 West Washington
Phoenix, AZ 85007
(602) 255-3333

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
THE COURT OF APPEALS ERRONEOUSLY INVALIDATED THE WASHINGTON STATUTE ON THE FACIAL OVERBREADTH DOCTRINE	3
CONCLUSION	11

TABLE OF CITATIONS

	Page
Broadrick v. Oklahoma 413 U.S. 601 (1982)	2, 3, 4, 5, 6, 8
City Council of Los Angeles v. Taxpayers for Vincent __ U.S. __, 52 U.S.L.W. 4594 (1984)	5, 8, 11
Eikenberry v. J-R Distributors, Inc. 725 F.2d 482 (1984)	6
New York v. Ferber 458 U.S. 747 (1982)	2, 7, 8, 10, 11
Turchick v. United States 561 F.2d 719 (8th Cir. 1977)	6, 7
Arizona Revised Statutes § 12-811	1
Arizona Revised Statutes § 13-3501	1

INTEREST OF THE AMICI

Amici states are vitally interested in the preservation of the traditional principles of federalism as well as the proper allocation of powers between the federal and state judiciary. Amici states strongly believe that the regulation of obscenity through the abatement of nuisance is an important state objective as shown by the enactment of the various state laws.[1] The invalidating of these state laws on facial overbreadth grounds without any opportunity for the state judiciary to first interpret and limit state laws seriously frustrates the enforcement of these important state laws. Moreover, this preemption of state judicial functions unnecessarily disrupts the delicate

---

1. E.g., Arizona Revised Statutes §§ 13-3501, 12-811

balance of federal/state relations and usurps the traditional powers of the state courts. For these reasons, amici states urge this Court to reverse or remand the decision of the Court of Appeals holding the Washington moral nuisance statutes facially overbroad and unconstitutional.

SUMMARY OF THE ARGUMENT

The Court of Appeals should not have struck down the Washington statute on overbreadth grounds. It incorrectly applied the governing precedents in its decision. More glaringly, it either ignored or was unaware of this Court's decision in New York v. Ferber, 458 U.S. 747 (1982), which required the application of the Broadrick "substantial overbreadth" test to this case. The correct application of that test should have led to the affirmance of the Dis-

trict Court's decision. At a minimum, this Court should summarily remand this case to the Court of Appeals for it to apply the correct test.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY INVALIDATED THE WASHINGTON STATUTE ON THE FACIAL OVERBREADTH DOCTRINE

The Court of Appeals struck down the entire Washington statute on the ground that it was facially overbroad. The overbreadth analysis was hinged on use of the word "lust" in the definition of the word "prurient". This use of the overbreadth doctrine is precisely what the Supreme Court cautioned against:

> "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is the exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise protected behavior that it forbids the State to sanction

> moves from "pure speech" toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect--at best a prediction--cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1982).

In Broadrick this Court recognized that the overbreadth doctrine is "strong medicine" and has been employed with hesitation, and then only as a last resort. Id. at 613.

Amici states believe that this "strong medicine" shoud not have been used by the Court of Appeals and that this case does not belong to the "last resort" category. Instead, the Wash-

ington courts should have been given an opportunity to construe the state statute to limit or cure any overbreadth problem.

The Broadrick doctrine was reaffirmed by this Court only a few months ago. In City Council of Los Angeles v. Taxpayers for Vincent, ___ U.S. ___, 52 U.S.L.W. 4594 (1984). This Court, citing Broadrick, said:

> " The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itslef--the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court." Id. at _____, 42 U.S.L.W. at 4597-4598.

The Court of Appeals' opinion here, in its intepretation of the word "lust" as non-prurient, simplistically theorized an impermissible application of the Washington statute. Moreover, the Court of Appeals did not address the "substantial overbreadth" question. It erroneously believed that this Court's decision in Broadrick "implies that a finding of substantial overbreadth is necessary only when the challenged statute regulates conduct and not speech", citing Turchick v. United States, 561 F.2d 719, 722 (8th Cir. 1977). It went on and agreed with Turchick that "a challenge to a statute regulating pure speech would succeed on a lesser showing of facial overbreadth". Eikenberry v. J-R Distributors, Inc., 725 F.2d 482, 487 (1984).

The above-quoted language ignores totally this Court's decision in New

York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982):

> " Broadrick was a regulation involving restrictions on political campaign activity, an area not considered "pure speech," and thus it was unnecessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in Broadrick, the requirement of substantial overbreadth extended "at the very least" to cases involving conduct plus speech. This case, which poses the question squarely, convinces us that the rationale of Broadrick is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution." Id. at 771.

Since the Ferber case implicated not only conduct but speech as well, the implied dichotomy in the application of the substantial overbreadth test observed by the Turchick court has been eliminated. Therefore, at the very least, the Court of Appeals'

failure to recognize the holding in Ferber should result in the remand of this decision to the Court of Appeals for it to properly apply the "substantial overbreadth" test. Application of this test, as mandated by Ferber and the recent decision in City Council v. Los Angeles, should result in the reconsideration and reversal of its decision. Furthermore, assuming the correctness of the Court of Appeals' belief that the word "lust" is non-prurient and is therefore constitutionally protected, it is incumbent upon the Court of Appeals to determine how often, if ever, the Washington statute would be used to chill this protected speech.[2] Amici submit that such an

---

2. Broadrick requires "that the overbreadth of a statute be not only real, but substantial as well." Broadrick at 7701 (emphasis supplied).

occurrence is most improbable. To begin with, the definition of "prurient interest" alone would not result in a nuisance abatement. The Washington moral nuisance abatement statute comes into operation only when a defendant has knowldge of the nuisance which requires the presence or existence of patently offensive sexual or violent conduct in the lewd matter. The "lewd matter" definition further requires the appeal to the prurient interest test and a number of patently offensive representations or descriptions of sexual or violent acts and which, where considered as a whole and in the context in which it is used, lacks serious literary, artistic, political, or scientific value.

Therefore, assuming the correctness of the Court of Appeals' definition of the word "lust", the statute would be

unconstitutional only when applied to a matter which depicts sexual conduct which is patently offensive without serious literary, artistic, political or scientific value and which excites only the non-prurient "lust". This examination of the Washington statute as a whole would necessarily lead one to the conclusion that impermissible applications of the statute may never occur, or that it may amount to no more than a miniscule fraction of the situations within the statute's reach. This case, therefore, is no different from the Ferber case in which this Court opined, "Nor will we assume that the New York courts will widen the possibility invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals". Ferber, 458 U.S. at 772. The proper resolution, therefore is:

"Whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions assertedly may not be applied [citing Broadrick]." Ferber, 458 U.S. at 773-774.

CONCLUSION

In this case, the Court of Appeals did not afford the Washington courts an opportunity to apply the law case by case. Instead, the entire statute was struck down on the basis of its interpretation of the meaning of one word--"lust". Such a meat-axe cleaver approach is disharmonious to federal/state relations, incompatible with notions of federalism, and inconsistent with established case law laid down by this Court. Amici states believe that this decision must be reversed. Alternatively, since the Court of Appeals was unaware of Ferber and City Council of Los Angeles, this Court should sum-

marily remand this case to the Court of Appeals for it to consider the "substantial overbreadth" question.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of Arizona

By_____
ANTHONY B. CHING
Solicitor General
(Counsel of Record)
1275 West Washington Street
Phoenix, Arizona 85007
Telephone: (602) 255-3333